IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 386

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,

Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE and JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934,

Respondents.

BRIEF FOR RESPONDENTS.

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Counsel for Respondents.

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Respondents.

BRIEF FOR RESPONDENTS.

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE.

The Statement of the Case contained in Petitioner's Brief requires further clarification.

(1) By petitioner's own statement, this case is now confined to a single procedural point—how an appeal is to be taken under the amendatory Act of June 22, 1938. The merits of the controversy which existed between respondents and petitioner in the courts below are not only not

presented to this Court for review, but have been finally adjudicated and determined in favor of respondents.

(2) The creditors' petition for the reorganization of The Albert Dickinson Company filed on June 13, 1934 (R. 1, *et. seq.*), the Debtor's answer thereto, the subsequent approval of the petition for reorganization (R. 10), confirmation of the plan of reorganization (R. 16), and the order requiring the filing of petitions for fees and compensation (R. 25), all occurred prior to the effective date of the amendatory Act of June 22, 1938, which was September 22, 1938. The District Court never made an order declaring the amendatory Act applicable to these proceedings, nor did the Circuit Court of Appeals. No application for such an order, in fact, was made to either court (R. 49). Petitioner itself, when it sought to appeal from the order of the District Court of October 26, 1938 (the order which respondents also appealed from) made an application for leave to appeal in the Circuit Court of Appeals on December 5, 1938. This procedure was identical with that followed by respondents (R. 49). The first time that the amendatory Act of June 22, 1938, was mentioned was on January 10, 1939, when the motion to dismiss the appeal was made by petitioner (R. 43).

(3) Petitioner in referring to the ruling of the Circuit Court of Appeals on its appeal, which was docketed as case No. 6822 (Petitioner's Brief, pages 4, 26), ignored the following paragraph in the opinion of the court:

> "If there were any doubt in this respect, however, there is nothing in the petition or assignment of errors which disclosed how or in what manner the court abused its discretion in the fixing and allowance of fees. This court has held that such allowance in a reorganization proceeding is to be made in the exer-

cise of discretion by the District Judge, subject to review only when there has been an abuse of such discretion, or an erroneous application of the law. (*In re Tower Bldg. Corp.*, 88 F. (2d) 347). The petition raises no question of law and no showing whatever is made as to any abuse of discretion on the part of the District Court."

SUMMARY OF ARGUMENT.

I.

Prior to the enactment of the amendatory Act of June 22, 1938, this Court had decisively determined in *Shulman v. Wilson-Sheridan Hotel Co.*, 301 U. S. 172, that an appeal from an order concerning fees in a proceeding under Section 77(b) of Chapter VIII of the Bankruptcy Act of 1898 could be taken only by leave of the Circuit Court of Appeals. This was the precise procedure followed by respondents.

Section 250 of the amendatory Act is the specific enactment of Congress to the effect that appeals on fee questions in reorganization proceedings are to be allowed by the Circuit Court of Appeals, which special provision takes precedence over and controls the general provisions of Sections 24(a) and (b) and 25 of the amendatory Act of June 22, 1938.

The construction of Section 250 of the amendatory Act adopted by the Circuit Court of Appeals in this case is supported by a comparison of the provisions of Section 250 of the amendatory Act with its counterpart, Subsection (c) (9) of Section 77(b).

The construction of Section 250 of the amendatory Act adopted by the Circuit Court of Appeals in this case is in accordance with sound policy and practice, and furthers a more expeditious administration of the Act. Fee claimants in a reorganization proceeding are essentially fidu-

ciaries for the other parties in interest and should not have an unqualified right of appeal.

II.

The amendatory Act of June 22, 1938, which became effective on September 22, 1938 is not applicable to these proceedings. The petition for reorganization of The Albert Dickinson Company was approved more than three months prior to the effective date of the amendatory Act. Accordingly, the provisions of the amendatory Act apply to the proceedings only to the extent that the district judge deems practicable. (Sec. 276-c of the amendatory Act of June 22, 1938).

The district judge never made an order applying the amendatory Act to this proceeding. No such order was ever sought by any party in this case nor was any hearing ever held on the question of the applicability of the amendatory Act.

The question as to whether the amendatory Act should be applied to these proceedings is one of judicial discretion to be exercised with a view of the fairness, feasibility and convenience of the parties, as shown by the record.

The amendatory Act should not be applied retroactively to these proceedings nor should it be applied if the result of so doing would be to destroy respondents' remedy.

III.

The steps taken by respondents in prosecuting and perfecting their appeal substantially complied with Rule 73 of the Rules of Civil Procedure, which would govern the

practice required to be taken by them in the event that petitioner here was right, in its contention that (1) the amendatory Act governed these proceedings, and (2) under that Act, contrary to the construction adopted by the Circuit Court of Appeals, this appeal could have been taken only as of right.

At the time respondents were required to take the appeal, no judge or court had made an order with respect to the applicability of the amendatory Act of June 22, 1938 to these proceedings. This court had not promulgated the new Rules in Bankruptcy, and there was grave doubt as to whether the new Rules of Civil Procedure or the former Equity Practice prescribed the proper procedure as to an appeal. (*In re Schuehm Realty Co.*, C. C. A. 3 Cir., 100 F. (2) 532.)

No authoritative judicial construction of either the amendatory Act or the Rules of Civil Procedure had occurred. Under the circumstances of this case, the petition to revise filed by respondents should be treated as an appeal. (*Taylor* v. *Voss*, 271 U. S. 176.)

IV.

The merits of the controversy between petitioner and respondents have been adjudicated in favor of respondents. The failure of petitioner to present the question of the merits of this case to this Court for review (see petitioner's brief, pages 2, 9 and 39), leaves the adjudication by the Circuit Court of Appeals of respondents' right to receive increased compensation final and binding upon all parties.

ARGUMENT.

I.

The amendatory Act of June 22, 1938 invests the Circuit Court of Appeals with jurisdiction to allow an appeal from an order of the District Court allowing or refusing to allow compensation in proceedings for the reorganization of a corporation irrespective of the amount involved.

The Circuit Court of Appeals in this case held that the appeal by respondents from the order of October 26th, 1938 was properly taken by leave of the Circuit Court of Appeals rather than by the filing of a notice of appeal in the District Court (R. 51).

The order of October 26th, 1938 related solely to the allowance of fees, expenses and compensation to various parties for services rendered in connection with the reorganization of The Albert Dickinson Company (R. 26).

The Circuit Court of Appeals reached its conclusions through a construction of Section 250 of the amendatory Act of June 22nd, 1938. (52 Stat. 901; 11 U. S. C. A. 650.)

An analysis of that section of the amendatory Act is best commenced by an examination of its counterpart in the earlier statute which is Sub-section (c) (9) of Section 77(b). (48 Stat. 912; 11 U. S. C. A. Sec. 207(c)(9).) That section reads as follows:

> "(c). Upon approving the petition or answer or at any time thereafter, the judge, in addition to the juris-

diction and powers elsewhere in this section conferred upon him, * * * (9) may allow a reasonable compensation for the services rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and the plan by officers, parties in interest, depositaries, reorganization managers and committees or other representatives of creditors or stockholders, and the attorneys or agents of any of the foregoing and of the debtor, but appeals from orders fixing such allowances may be taken to the Circuit Court of Appeals independently of other appeals in the proceedings and shall be heard summarily; * * *."

Section 250 (11 U. S. C. A. Sec. 650) of the amendatory Act reads as follows:

> "Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this title, be **taken to and allowed by** the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers." (Emphasis supplied.)

Certain important distinctions at once appear between Sub-section (c) (9) of Section 77(b) and Section 250 of the Chandler Act:

(1) Congress in enacting Section 250 of the amendatory Act deliberately changed one essential phrase in the Act by inserting the words "and allowed by." The phrase in Section 77(b) reads: "but appeals from orders fixing such allowances may be taken to the Circuit Court of Appeals." The phrase in the amendatory Act reads: "Ap-

peals may * * * be taken to and allowed by the circuit court of appeals."

(2) Congress in dealing with the question of appeals on fees in reorganization proceedings enacted a section which now deals exclusively and solely with that question. Subsection (c) (9) of Section 77(b) provided for the allowance of fees and only dealt with the question of appeals in providing that appeals might be heard independently of other appeals.

Shulman v. *Wilson-Sheridan*, 301 U. S. 172;

3 Gerdes on Corporate Reorganizations (1936) § 1207.

The intention of Congress in inserting the words "and allowed by" in the Statute and in specially providing for appeals under the amendatory Act is at once apparent upon an examination of the Act. In the revisions of Sections 24(a) and (b) (11 U. S. C. A. Sec. 47) and 25 (11 U. S. C. A. Sec. 48) of the Bankruptcy Act, Congress was abolishing the distinction between appeals in "proceedings" and those in "controversies" in bankruptcy and in their stead substituted a test solely of the amount involved. This court in *Shulman* v. *Wilson-Sheridan, supra*, had, however, laid down the rule that appeals on fees might not be taken as of right, but only in the discretion of the Circuit Court of Appeals. That rule had been most satisfactory in operation in enabling Circuit Courts of Appeal to reduce the number of unwarranted appeals on the question of the allowance of fees, and it was with this in view that the words "and allowed by" were inserted in the Statute, as well as the entire subject of appeals in reorganization proceedings, being specially dealt with in the amendatory Act.

The contrast between the provisions of Section 77(b) and those of the amendatory Act relating to appeals on fee questions is, of course, important.

In *Brewster* v. *Gage*, 280 U. S. 327, at 337, this Court said:

> "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."

In this case, there is that deliberate selection of language by Congress and that deliberate difference in treatment of the subject which would again indicate that Congress intended to alter the statutory provisions, so as to preserve in operation the rule laid down by this court in *Shulman* v. *Sheridan-Wilson, supra.*

Petitioner, in an effort to meet the plain language of the Statute and the construction adopted by the Circuit Court of Appeals, has argued that the words "taken to" were inserted in Section 250 for the purpose of providing that appeals on fee questions involving $500 or more should be taken as of right and that appeals involving less than that amount should be granted only by leave of the Appellate Court (Petitioner's Brief, page 24). In other words, petitioner contends that the words "taken to" in describing an appeal mean that such an appeal must be taken as of right. This court, however, in *Shulman* v. *Wilson-Sheridan, supra*, in passing on Sub-section (c) (9) of Section 77(b), in which the words "taken to" appeared, held that these words did not create or describe an appeal as of right.

No other explanation has been made by petitioner as to what the meaning of the words "allowed by the Circuit Court of Appeals" in Section 250 of the Chandler Act

could be, other than the plain meaning which the Circuit Court of Appeals in its opinion gave to them, that is, that the Circuit Court of Appeals may, in its discretion, allow the appeal (R. 51, 59).

Petitioner also contends that the words "in the manner and within the time provided for appeals by this Act" mean that the allowance of appeals upon fee questions must be under Section 24(a) and (b) of the Chandler Act.

The difficulty with petitioner's position here is that Congress in enacting Section 250 of the amendatory Act clearly intended that the provisions of Section 250 should take precedence in fee cases over the other sections of the amendatory Act dealing with appellate jurisdiction. Congress, for instance, provided that appeals on fee questions should be "summarily heard upon the original papers," heard "independently of other appeals in the proceeding" and "taken to and allowed by the Circuit Court of Appeals."

Petitioner itself invoked one of the special features of this section when it procured an order to the effect that the Clerk of the District Court transmit all of the "original papers" to the Circuit Court of Appeals and also that the Circuit Court of Appeals hear the case on the original papers without a printed transcript (R. 33, 67).

In other words, Section 250 of the amendatory Act is special legislation insofar as appellate proceedings on fee questions are concerned and overrides the provisions of Sections 24(a) and (b) and 25 of the amendatory Act to the extent that those provisions are inconsistent with Section 250. As the Circuit Court of Appeals aptly observed, the maxim of *generalia specialibus non derogant* controls, in that Congress has by specific mandate directed that appeals on fee questions in a reorganization proceeding

should be allowed by the Circuit Court of Appeals. The view of the Circuit Court of Appeals is sustained by ample authority.

In the case of *State of Missouri* v. *John T. Ross, Trustee*, 299 U. S. 72, this court, in construing Section 64(b) of the Bankruptcy Act with respect to the priority of taxes, held that the segregation of such items in a specific class gave to them precedence over items awarded priority in other paragraphs and sections of the Act.

The Court there said at page 76:

> "But this conclusion must be rejected; for conceding that taxes are debts, they are carved out of the general provisions of paragraph (7) and put in a special class under paragraph (6), and thus fall within the rule that special provisions prevail over general ones which, in the absence of the special provisions, would control. *Townsend* v. *Little*, 109 U. S. 504, 512, 27 L. Ed. 1012, 1015, 3 S. Ct. 357; *McKee* v. *United States*, 164 U. S. 287, 294, 41 L. ed. 437, 439, 17 S. Ct. 92; *Kepner* v. *United States*, 195 U. S. 100, 125, 49 L. ed. 114, 122, 24 S. Ct. 797, 1 Ann. Cas. 655; *Re Rouse, H. & Co.*, (C. C. A. 7th) 91 F. 96, 101, 1 Am. Bankr. Rep. 234; *Re Slomka*, (C. C. A. 2d) 122 F. 630, 631, 9 Am. Bankr. Rep. 635."

Likewise, in the case at bar, the special provisions governing the taking and allowance of appeals on fee questions in reorganization proceedings take precedence over the general provisions of Section 24(a) and (b) and 25 of the amendatory Act.

In *D. Ginsberg & Sons, Inc.* v. *Joseph Popkin*, 285 U. S. 204, at 208, the Court said:

"General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *United States* v. *Chase*, 135 U. S. 255, 260, 34 L. ed. 117, 119, 10 S. Ct. 756, 8 Am. Crim. Rep. 649. Specific terms prevail over the general in the same or another statute which otherwise might be controlling."

Baltimore National Bank v. *State Tax Commission of Maryland*, 297 U. S. 209, 215:

"It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling."

The construction of Section 250 adopted by the Circuit Court of Appeals is in accord with sound practice and policy. An appeal on fees, as indicated by the opinion of the Circuit Court of Appeals, which petitioner itself does not attack, primarily involves questions concerning the proper exercise of discretion by the trial court. In many circumstances, an appeal will not lie from an order which is discretionary in the trial court.

Wayne United Gas Co. v. *Owens-Illinois Glass Co.*, 300 U. S. 131;

In re Gelino's, (C. C. A. 7th Cir.) 51 F. (2d) 875, and cases cited at page 877, Cert. denied 284 U. S. 659.

It is therefore only by virtue of the statute that an appeal can be taken from the allowance or disallowance of fees. Sound policy determined, as the Circuit Court of Appeals here decided, that the right to such appeal should rest within the wise discretion of the Circuit Court of Ap-

peals. The Circuit Court of Appeals in this case aptly stated the reasons for this policy in its opinion[1] (R. 58, 59).

There is, in respondents' view, a particularly delicate relationship between any fee claimant in a reorganization proceeding and the other parties in interest in the pro-

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[1] "In reaching our conclusion we were guided by what we believed to be the intention of Congress in enacting the bankruptcy legislation, namely, the desire to expeditiously administer the estates of insolvents. The more recent amendments to the general bankruptcy act, which for the purpose of convenience might be called the reorganization provisions as distinguished from the liquidation sections of the old act, should be similarly construed. Expedition in the reorganization of a debtor is as essential for the protection of creditors as is expedition in liquidations under the old bankruptcy act.

"One of the possible methods of delay is through appeals. While the right to apply for an appeal in bankruptcy cases may be as important as in other suits, experience has demonstrated that there is a possibility for the misuse of the said right of appeal where reorganization of a debtor with many creditors holding valuable assets is about to be effected. Such a situation affords unusual opportunities for one avariciously inclined to create a nuisance value for a claim otherwise lacking in merit.

"In other words, appeals may tie up the liquidation of the estate or the reorganization of the debtor, although the amount involved is relatively small.

"It seems, for this reason, Congress has, in the old act as well as in the amended act, guarded against abuse by providing that the right of appeal shall not be an absolute one but, in some cases, allowable only in the discretion of the court of appeals.

"Section 250 of the Chandler Act carries such an intention on the part of Congress. In construing this section, it is significant, first, that it deals specifically and exclusively with appeals taken from orders allowing compensation or reimbursements, and second, that it provides expressly for limitation of time within which the appeal may be taken and it also provides that such appeals 'be taken

ceeding.[2] Petitioner, in effect, argues that such a claimant is to be considered in the same light as any other litigant appearing in the reorganization proceeding. (See Petitioner's Brief, pages 29 and 30.) Respondents do not share that view. They feel rather that the status of an attorney or fee claimant in a reorganization proceeding is that of a fiduciary to the rights of the creditors and stockholders of the debtor, who should not be permitted to appeal without first making such a *prima facie* case as would justify the Circuit Court of Appeals, in the exercise of sound judicial discretion, to permit him to proceed.

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to *and allowed by the Circuit Court of Appeals* independently of other appeals in proceedings and shall be summarily heard upon the original papers.' In other words, Congress, by this section, was dealing specifically with the subject of appeals from an order allowing compensation to those who had helped in the reorganization of the debtor. The last clause squarely indicates the necessity of prompt disposition of the appeal. The clause 'allowed by the Circuit Court of Appeals' can not be ignored. It suggests an intent to avoid frivolous appeals and appeals for purpose of delay. It necessitates the exercise of a discretion by the Circuit Court of Appeals to the end that delays may be avoided. At the same time, it protects the rights of those who are sincerely convinced that an allowance was either inadequate or extravagant. Dealing as it does, specifically with this subject-matter, it should be construed as exclusive."

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[2] *Realty Associates Securities Corporation* v. *O'Connor*, 295 U. S. 295;
In Re New York Investors, Inc., (C. C. A. 2nd Cir.) 79 F. (2d) 182;
Newton v. *Consolidated Gas Company of New York*, 259 U. S. 101;
In re Middle West Utilities Co., (D. C., N. D. Ill., E. D.) 17 Fed. Supp. 359, at 373;
In re Gilbert, 276 U. S. 294;
In re National Department Stores, Inc., (C. C. A. 3rd Cir.) 93 F. (2d) 123.

Since the doctrine of this case as laid down by the Circuit Court of Appeals is restricted solely to appeals relating to fees and compensation in reorganization proceedings, the case of *In re Winton Shirt Corporation*, (C. C. A. 3rd Cir.) 104 F. (2d) 777, (relating to a refusal to furnish a transcript), and the case of *England* v. *Ducasse*, (C. C. A. 9th Cir.) 104 F. (2d) 760 (relating to a dispute over a claim, not a dispute over fees), are without application to the problem before the court.

II.

The provisions of the Chandler Act are not applicable to these proceedings.

(a) *The amendatory Act of June 22, 1938 cannot be applied to these proceedings since no order was ever made by the District Judge applying the provisions of the amendatory Act to this case as required by Section 276-c of the amendatory Act.*

The petition for reorganization of The Albert Dickinson Company was approved on September 10, 1934 (R. 10).

The amendatory Act of June 22, 1938 by its terms became effective on September 22, 1938 and contained the following provisions with respect to its application to proceedings then pending under Section 77(b) (52 Stat. 905; 11 U. S. C. A. Sec. 676):

> "Sec. 276-c. The provisions of sections 77A and 77B of chapter VIII, as amended, of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act, except that—

(1) if the petition in such proceedings was approved within three months prior to the effective date of this amendatory Act, the provisions of this chapter shall apply in their entirety to such proceedings; and

(2) if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable; * * *."

Since the petition for reorganization of The Albert Dickinson Company was approved more than three months prior to the effective date of the amendatory Act (R. 10), the provisions of the amendatory Act as provided in Section 276-c (2) thereof are to apply to the proceedings only "to the extent that the judge shall deem their application practicable." The District Judge never made an order applying the provisions of the Chandler Act to these proceedings, and in fact no such order was ever requested by any party in either the Circuit Court of Appeals or in the District Court (R. 49).

The Circuit Court of Appeals, in its opinion, however, determined that the provisions of the amendatory Act governed the appeal (R. 51). This determination by the Circuit Court of Appeals must be considered in two lights:

First: Since the Circuit Court of Appeals decided that the procedure adopted by these respondents in taking their appeal was proper under the provisions of the amendatory Act (R. 51) the decision of the Circuit Court of Appeals to apply the amendatory Act did not in the view of that court destroy respondents' remedy, or in any manner affect it. Respondents also contended in the Circuit Court of Appeals, and do here contend, that by its own terms the amendatory Act is not applicable to these proceedings

if the result of such application would be the destruction of their remedy. Since the decision of the Circuit Court of Appeals is to the effect that the procedure adopted by respondents in taking their appeal (*Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172) was proper under the provisions of Section 250 of the amendatory Act itself, the effect of the decision of the Circuit Court of Appeals in this case was to leave respondents' remedy unchanged.

Second: Respondents do not believe that the Circuit Court of Appeals had jurisdiction to determine whether the amendatory Act should be applicable or not.

Sub-section 2 of Section 276-c above quoted provides for the application of the amendatory Act to the extent that the *judge* shall deem its application practicable, and hence apparently speaks of the District Court rather than the Circuit Court of Appeals, which acts through three judges as a court, rather than through any single justice. In addition, the word "judge" is defined in Sub-section 20 of Section 1 of the amendatory Act (52 Stat. 840) itself as follows:

> "'Judge' shall mean a judge of a court of bankruptcy, not including the referee."

The Circuit Court of Appeals is not a court of bankruptcy:

> "'Courts of bankruptcy' shall include the district courts of the United States and of the Territories and possessions to which this title is or may hereafter be applicable, • • •"
>
> Section 1, Sub-section 10 of the amendatory Act of June 22, 1938; 52 Stat. 840.

Consequently, if the application of the amendatory Act is dependent upon the sections above quoted, that Act does

not apply to this case, since no order was ever made by the District Judge (the judge of the court of bankruptcy) applying the amendatory Act to these proceedings.

Petitioner, in an effort to meet this situation argues that Sections 4 and 6(b) of the amendatory Act (52 Stat. 940) govern Appellate procedure. (See Petitioner's brief, pages 14 and 15.) These sections provide as follows:

> "Sec. 4—* * * Except to the extent necessary to give effect to the provisions of Section 6 of this amendatory Act, all Acts or parts of Acts inconsistent with any provisions of this amendatory Act are hereby repealed."
>
> "Sec. 6(b)—Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings, so far as practicable in cases pending when it takes effect; but proceedings in cases then pending to which the provisions of this amendatory Act are not applicable shall be disposed of conformably to the provisions of said Act approved July 1, 1898, and the Acts amendatory thereof and supplementary thereto."

Petitioner by urging that these sections apply to a proceeding under Section 77(b), ignores the first clause of Section 6(b)—

> "Except as otherwise provided in this amendatory Act * * *."

Section 276-c, *supra*, is the specific provision governing the applicability of the amendatory Act to proceedings pending under Section 77(b) at the time of the effective date of the Act (R. 51).

Petitioner is in further error when it argues that the effect of Sections 4 and 6(b) of the amendatory Act is to

automatically repeal all provisions of the prior law regulating appellate proceedings.

Repeals by implications are not favored in the law,[3] and moreover, the express language of both Sections 6(b) and 276(c) of the amendatory Act provides (1) that the Act is applied only so far as "practicable," and (2) that as to those cases to which the provision of the amendatory Act shall not be found applicable, the provisions of the earlier Act shall apply.

(b) *The question as to whether the amendatory Act of June 22, 1938 should be applied to these proceedings is one of judicial discretion to be exercised with the view of fairness, feasibility and convenience of the parties, as shown by the record.*

The test of "practicable" used in these circumstances does not mean "possible" as petitioner contends. It means rather "feasible," "fair" and "convenient." It requires that the court exercise a judicial discretion to that end (compare petitioner's brief at page 16).

The report of the Senate Judiciary Committee on the amendatory Act discloses that it was the intention of Congress to vest a full discretion in the District Judge. Senate Report No. 1916, 75th Cong. 3rd Sess.[4]

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[3] *U. S.* v. *Burroughs*, 289 U. S. 159, 164;
Frost v. *Wenie*, 157 U. S. 46;
U. S. v. *Healey*, 160 U. S. 136;
U. S. v. *Greathouse*, 166 U. S. 601;
Posadas v. *National City Bank*, 296 U. S. 497.

[4] On Page 39 of the report of the Senate Committee on Judiciary (May 27, 1938) in speaking of the effect of Section 276 of Chapter X, it is stated:

"* * * As to cases wherein the petition was approved more than three months before the effective

The Circuit Court of Appeals for the Third Circuit in construing the word "practicable" in connection with the amendatory Act, said in *Philadelphia & Reading Coal & Iron Co.*, (C. C. A. 3 Cir.) 105 F. (2d) 354:

> "The statutory provisions upon which the appellant relies are contained in Chap. X of the Bankruptcy Act. The application of these provisions to a proceeding such as the present one which was commenced under Sec. 77B is within the sound discretion of the district judge. They are to be invoked only if he shall deem their application to be practicable, that is feasible, fair and convenient, in the light of all that has previously happened in the pending proceeding. *In re Old Algiers, Inc.*, 2 Cir., 100 F. 2d 374; *In re Philadelphia & Reading Coal & Iron Co.*, 3 Cir., 104 F. 2d 126. The applicability of the several provisions of Chap. X is to be considered individually and not in whole. *London* v. *O'Dougherty*, 2 Cir. 102 F. 2d 524."

In a prior decision in the same case (104 F. (2d) 126), the Court said, at page 127:

> "The report of the Senate Committee on the Judiciary upon the bill discloses that it was the intention of Congress to vest a full discretion in this matter in the district judge. Senate Report No. 1916, 75th Cong. 3rd Sess.
>
> "It follows that the provisions of Section 156 are not to be applied to a prior proceeding unless the district judge, in the exercise of the discretion which the law has vested in him, deems their application practicable. Practicable, as used in the act, is not synony-

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date of this Act, the Judge is given full discretion to apply such provisions of this Chapter as are practicable."

mous with possible, but means feasible, fair and convenient. *In re Old Algiers*, 2 Cir., 100 F. 2d 374; *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* v. *Indianapolis, Columbus & Southern Traction Co.*, 169 Ind. 634, 81 N. E. 487; 3 Words and Phrases, Second Series, p. 1109. The fact that in every case it would be possible to appoint a trustee is immaterial."

In the case of *In re Old Algiers, Inc.*, 100 F. (2d) 374 (C. C. A. 2nd, 1938), the Court said, at page 375:

"In our opinion the test of practicability should be whether the new provisions, for aught that has happened in the pending proceedings, can be applied as fairly and conveniently as they could be had the proceeding been started within three months of the effective date of the Act—in which event the new provisions would indubitably control by reason of section 276(c) (1), 11 USCA Sec. 676 (c) (1). If, for example, administration had progressed so far that the assets of the estate had been distributed by way of dividends to creditors, it would be neither fair nor convenient to require creditors to return the dividends in order that fees might be paid pursuant to section 246; it would not be 'practicable' to apply the new provision. But where, as in the present case, the trustee still has funds in hand and the time for proving claims of creditors has not expired, fees to which the appellants may be entitled can apparently be as conveniently and as justly paid out of the estate as if the proceeding had been begun after June 22, 1938. Under such circumstances, it would seem to be 'practicable' to apply the amendatory provisions."

Judge Peters, in the case of *In Re Brown Co.*, 26 Fed. Supp. 843 (D. C. D. Me. S. D.) said at page 844:

"As this proceeding was begun on a petition approved more than three months before the effective

date of the recent Amendment to the Bankruptcy Act, it is apparent that the court must determine the extent to which a proposed application of any provisions of Chapter 10 is practicable before any such provisions can apply. Sec. 276 c (2), 11 U.S.C.A. Sec. 676(c) (2).

"The situation of this proceeding is such, I think, that it is *convenient* and *not unfair to any interest* for the Commission to file its appearance so that it may receive all notices, be heard in all matters arising, as other parties are heard, and deemed an intervenor in respect of all matters in the proceeding." (Emphasis supplied.)

The Circuit Court of Appeals for the Seventh Circuit in the matter of *In Re Kenilworth Building Corp.*, 105 Fed. (2d) 673, at page 676, said:

"It is first necessary to consider the meaning of 'practicable' as used in Section 276(c) (2) of the Chandler Act. The Circuit Court of Appeals for the Third Circuit construes the word 'practicable' as follows: 'Practicable * * * is not synonymous with possible, but means feasible, fair and convenient.' In view of what had transpired prior to the ruling of the court at the time of the report on acceptances, it was not 'feasible, fair and convenient' to apply Section 198. Up to that time the conduct of the proceedings in respect to the adoption of the plan obviously was on the assumption that all claims filed and allowed had to be considered in determining whether creditors holding two-thirds in amount of claims allowed were in favor of acceptance.

"* * * It would not be practicable to apply a provision of the Chandler Act if it authorizes confirmation of a proposed plan in case the plan is approved

by creditors holding two-thirds in amount of about $74,000 of claims when the reorganization proceeding had been conducted on the assumption, and upon the understanding of all interested parties, that the proposed plan could not be confirmed by the court unless it should be approved by the holders of two-thirds in amount of $112,000.

"The application of the section of the Chandler Act brought about a result which, upon the basis of the written acceptances, it was impossible to attain under Section 77B; and since it was not invoked until after the plan had been submitted to holders of claims and until it was too late for holders of claims which had been filed by the indenture trustee to refile their claims, the result was to prevent their participation in the consideration of the plan. The application of Section 198 at the stage of the proceedings at which it was invoked could be construed 'practicable' only in the sense that it afforded a strictly formal procedural means to secure acceptance of the plan. But in view of the stage of progress in the reorganization proceedings the application was impracticable in any substantial sense since it could not be said to be adapted to the effectuation of the true purposes of the reorganization proceeding."

The case of *Pittsburgh C. C. & St. L. Railroad Co.* v. *Indianapolis C. & S. Traction Co.*, 169 Ind. 634, 81 N. E. 478, 488, hinged upon the construction of the word "practicable", as used in the Indiana statutes. The Court, in discussing the meaning of the word, said:[5]

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[5]This definition has been accepted in many other decisions:

Wilcox v. *The Supreme Council of Royal Arcanum*, 66 Misc. 253; 123 N. Y. S. 83, 86;

"The word practicable, as used in the statute, we think should be given its usual and ordinary meaning as indicated by its context. Plainly it is not synonymous with 'possible.' A thing practicable must necessarily be possible, but a thing may be possible that is not practicable. * * * The English Law Dictionary defines the word 'as possible of reasonable performance.'

"The phrase 'if the court shall find it practicable' implies a legal discretion, and the exercise of judgment based upon the whole evidence of all the facts that affect the question of practicability within the usual and ordinary sense of the word. The question therefore depends upon the circumstances of each particular case."

In other words, the courts of this country, in construing the meaning of the word "practicable," have uniformly held that the word imparts the requirements of a judicial discretion exercised with the view of fairness, feasibility and due regard to the rights of the parties before it.

(c) *In accordance with the accepted standards of judicial discretion, the amendatory Act of June 22, 1938 should not be applied to these proceedings, if the result of so doing would be to destroy and disrupt respondents' remedy.*

Rizer v. *The People*, 18 Col. App. 401; 69 Pac. 315;
Streeter v. *Streeter*, 43 Ill. 155, 156;
Beech Fork Coal Co. v. *Pocahontas Corp.*, 109 W. Va. 39, 47; 152 S. E. 785;
Ex Parte Williams, 128 Tex. Cr. Reports 148; 79 S. W. (2d) 325;
Ford v. *Ford*, 70 Wis. 19; 33 N. W. 188, 196.

The question as to the application of the amendatory Act is therefore one of judicial discretion to be exercised only after a full consideration of the rights of the parties.

On October 26th, 1938, when the order appealed from was entered, the question as to the application of the amendatory Act had never been presented to the District Court by any party in the case and was, in fact, never presented to that court, nor did that court ever make an order regarding that subject at any time (R. 49).

That was the situation on November 25th, 1938 when the petition for leave to appeal was filed (R. 34), on December 13th, 1938, when the Circuit Court of Appeals allowed the appeal (R. 42), on December 22nd, 1938 when the Circuit Court of Appeals approved the appeal bond (R. 42), and on December 23, 1938, when respondents filed their praecipe for record in the District Court (R. 29). As a matter of fact, petitioner itself when it sought to appeal from the order of the District Court of October 28th, 1938 (the order which respondents also appealed from) filed an application for leave to appeal in the Circuit Court of Appeals on December 5th, 1938. This mode of procedure was identical with that taken by respondents (R. 49).

Petitioner was apprised of every step taken by respondents in pursuing their appeal and remained entirely silent in the matter. This silence is peculiarly striking in the light of Rule 38 of the Circuit Court of Appeals for the Seventh Circuit,* governing the allowance of discretionary

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*Rule 38 of the United States Circuit Court of Appeals for the Seventh Circuit.

1. Petitions to this Court for leave to appeal from decisions of the District Court in Bankruptcy cases shall be docketed upon the petitioner's making the required deposit

appeals. Rule 38 provides that the Appellee in such an appeal may, within five days after the application for leave to appeal is filed, file an answer and a brief in opposition to the allowance of the appeal.

The first time that the question of the application of the amendatory Act arose in this record was on January

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for costs and filing an original and three copies of the petition, assignment of errors and brief in support of petition together with proof of service on respondent of copy of each, and with notice of date of filing.

2. *What Petition Shall Contain.* The petition shall set forth the facts under oath which shall contain a brief history of the proceedings in the District Court; all important dates; the amount of the indebtedness; the estimated value of the assets; the amount and status of the claims of the creditors who are petitioning for permission to appeal; a statement showing when such creditors acquired their claims, whether before or after bankruptcy proceedings were instituted; a copy of any order or memorandum of views announced by the District Judge. The respondent may file an answer and if so, it must be under oath, setting forth any pertinent facts which bear upon the exercise of a wise discretion on the part of this Court. It may also contain facts, if supported by the record, bearing on petitioner's right to the relief sought. The petition shall be supported by an original typewritten brief, an original and three copies of which shall be filed with the Clerk which shall set forth the statute and decisions as well as other reasons why the petition should be allowed. Unless permitted by this Court, only those who are parties in the District Court may file briefs in this Court.

3. Respondent may support its answer by a brief of which he shall file an original and three copies within five days from the filing date designated in said notice, together with proof of service of a copy on petitioner. Briefs in support of or in opposition to such application need not be printed.

4. The matter shall then be submitted to the Court by the Clerk. No oral argument by counsel will be heard unless requested by the Court.

10th, 1939, when petitioner sought to dismiss the appeal allowed by the Circuit Court of Appeals on December 13th, 1938 (R. 42).

The nature of petitioner's motion of January 10th, 1939 demands close scrutiny. That motion did not request the Circuit Court of Appeals to apply the amendatory Act from that point *forward* but rather requested the Circuit Court of Appeals to apply the amendatory Act *retroactively* to proceedings which had been taken in connection with the appeal more than a month and a half earlier.

The situation of the parties on January 10th, 1939 is also significant. By that date, the time in which respondents might have proceeded to perfect an appeal from the order of October 26th, 1938 in any other manner had expired. The artifice adopted by petitioner could result, therefore (if it was successful), in the total destruction of respondents' remedy.

The motion of petitioner made on January 10th, 1939, necessarily involves one of two assumptions:

(1) that the amendatory Act had been in application to these proceedings continuously from the date of its enactment even though there had been no judicial determination or consideration of the question, or

(2) that the Circuit Court of Appeals on January 10th, 1939, in determining that the amendatory Act should apply, should make its determination retroactive and *nunc pro tunc*, either as of December 13th, 1938 when it allowed the appeal or as of some earlier date.

The first assumption is disclaimed by petitioner itself. Petitioner admits that a judicial determination is required as to whether the amendatory Act applies or not. (See

Petitioner's Brief page 16). Beyond this, however, the language of the amendatory Act itself, as discussed in earlier portions of this brief (at page 20), not only requires a judicial determination but one made through the application of judicial discretion as well.

The second assumption that the decision of the court to apply the amendatory Act should be as of a date earlier than January 10th, 1939 when the subject was first raised in the record is likewise unsound. Accepted standards of judicial discretion condemn such a practice.

In the recent case of *Ginsberg* v. *Lindel*, 107 F. (2d) 721 (C. C. A. 8 Cir.), a petition in bankruptcy was filed on November 22, 1938, two months after the effective date of the amendatory Act of June 22, 1938. A question arose as to the amount of a landlord's lien. Under the Iowa law and the Bankruptcy Act of 1898, the landlord was entitled to a lien for one year. Under Section 64, sub. a, of the Act of June 22, 1938 (52 Stat. c. 575, pp. 840, 874; 11 U.S.C.A. Sec. 104), the landlord's priority is restricted to rent for the three months prior to the date of the bankruptcy. The trial court held that the landlord's right of priority was to be restricted by the provisions of the amendatory Act. The Circuit Court of Appeals, in reversing the trial court and in holding the amendatory Act not applicable, said (page 725):

> "The Chandler Act is an amendatory act, and the order of the court gave to it a retrospective effect. The effect of the order is to destroy a lien already vested in the lessors to secure the payment of $3,300. That obligation was fixed, and the lien was enforceable under the Iowa law. The trustee's contention that appellants' statutory lien is not a vested property right is erroneous. *Smith* v. *Russel*, 223 Iowa 123, 272 N. W. 121, 125; *Richardson Brothers* v. *Peter-*

son, supra; Grant v. *Whitwell, Marsh & Talbott,* 9 Iowa 152, 157; *Britton* v. *Western Iowa Co.,* 8 Cir., 9 F. 2d 488, 490, 45 A. L. R. 711; 16 C. J. S., Constitutional Law, Sec. 233. The further contention that a right created by statute may be annulled by statute is equally erroneous in so far as the argument implies that vested property rights may be destroyed. Legislation by Congress may supersede that of a state in a particular instance, but Congress can not repeal a state law; nor can it exert control over individual property rights except in the proper exercise of its constitutional powers. The state which enacted the law may repeal it, but the repealing act can not destroy property rights vested under the old law. *Ettor* v. *Tacoma,* 228 U. S. 148, 155, 156, 33 S. Ct. 428, 57 L. Ed. 773; *Hannahs* v. *Felt,* 15 Iowa 141.

"* * * There is nothing contained in the Chandler Act to indicate that Congress intended that section 64, sub. a, should be construed retrospectively; and in the absence of explicit language requiring such construction we are not disposed so to construe it, especially when to do so would result in depriving a citizen of a vested right. It is the general rule that a retrospective operation will not be given to a statute which interferes with antecedent rights, unless such be the unequivocal and inflexible import of its terms and the manifest intention of the legislature. *U. S. Fidelity & Guaranty Co.* v. *United States, to Use of Struthers Wells Co.,* 209 U. S. 306, 314, 28 S. Ct. 537, 52 L. Ed. 804; *Louisville Woolen Mills* v. *Johnson,* 6 Cir., 228 F. 606; *Holt* v. *Henley,* 232 U. S. 637, 34 S. Ct. 459, 58 L. Ed. 767; *Jones* v. *Fidelity & Columbia Trust Company,* 6 Cir., 73 F. 2d 446; *Western Pacific R. Corp.* v. *Baldwin,* 8 Cir., 89 F. 2d 269; *Home Indemnity Company* v. *State of Missouri,* 8 Cir., 78 F. 2d 391."

In connection with the amendment of the Bankruptcy Act in 1926, the Circuit Court of Appeals for the Second Circuit, in the case of *In re John C. Gasteiger & Co.*, 25 F. (2d) 642, said:

"The act of 1926 is an innovation in bankruptcy legislation, the amendments of 1903 (section 18 (11 USCA Sec. 41)) and of 1910 (section 14 (11 USCA Sec. 32)) being both expressly made prospective only. The canon is well settled which interprets statutes prospectively unless the language admits of no other construction (*Chew Heong* v. *U. S.*, 112 U. S. 536, 559, 5 S. Ct. 255, 28 L. Ed. 770; *Shwab* v. *Doyle*, 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454; *Fullerton Co.* v. *Northern Pacific R. Co.*, 266 U. S. 435, 45 S. Ct. 143, 69 L. Ed. 367), and we are not sure that the clause, 'so far as practicable and applicable,' means to go further than to make the amendments 'applicable' to pending proceedings in matters of procedure, though perhaps it may. Even if it does, it gives the courts a wide discretion in determining when it is 'practicable' so to apply it, and by 'practicable' we understand that we must decide whether it *is just to disturb vested rights.*

"• • • The repugnance of most people to such changes in front does not arise alone from the fact that they may disrupt settlements made on the faith of the earlier assurance. The mere inconstancy of a sovereign in respect of what has once been granted is itself a grievance, and seems an injustice to most men. For these reasons it seems to us that it is not 'practicable' to apply retroactively section 64 (b) (7) to cases where the claims have all been filed and the rights all fixed." (Emphasis supplied.)

The same court in the case of *In Re Inland Dredging Corporation*, 61 F. (2d) 765, certiorari denied in *Castellano* v. *Globe Indemnity Co.*, 288 U. S. 611, said:

> "It has crystallized in the theorem that changes may be made in the remedy, so long as they do not affect the right."

This Court, in promulgating the Rules of Civil Procedure, observed the same concern with respect to actions then pending. (Rule 86 of the Rules of Civil Procedure for the District Courts of the United States):

> "They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."

See:

Harris v. *Biszkowicz* (C. C. A. 8 Cir.) 100 F. (2d) 854.

The General Order of this Court entered on January 16, 1939, promulgating the new General Orders and Rules in Bankruptcy, contained a similar provision:

> "It is further ordered that this order shall take effect on Monday, February 13, 1939, and shall govern all proceedings then pending to which its provisions are applicable, except to the extent that in the opinion of the court its application to such proceedings would not be practicable or would work injustice, in which event the General Orders and Forms in Bankruptcy heretofore established shall apply: * * *." 11 U.S.C.A. 53 (May 1939 Sup. Ed.).

The provisions of the Rules of Civil Procedure and the General Orders in Bankruptcy just quoted are expressions of the judicial doctrine enunciated in *Brinkerhoff-Faris Trust & Savings Company* v. *Walter O. Hill, Treasurer*, 281 U. S. 673, at 682:

> "But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

See also *Graham* v. *Goodcell*, 282 U. S. 409, at page 426:

> "The question is whether these circumstances remove the case from the operation of the general rule that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed. *Pacific Mail S. S. Co.* v. *Joliffe*, 2 Wall. 450; *Ettor* v. *Tacoma*, 228 U. S. 148; *Forbes Pioneer Boat Line* v. *Everglades Drainage District*, 258 U. S. 338."

See also *Hoyt Metal Co.* v. *Atwood*, (C. C. A. 7 Cir.) 289 Fed. 453 at 455:

> "The statute in question, though purporting to affect only the remedy, in reality impairs the value of a right. Though it may be true that parties to actions have no vested right in rules of procedure, and the latter may be changed at will by the Legislature, without affecting the right, yet if statutes, professing only to affect procedure or remedy, do in fact thereby affect

or impair the right, they are void or inapplicable as against the enforcement of the right thus impaired. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that result is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case, it is prohibited by the Constitution. *Tennessee* v. *Sneed*, 96 U. S. 69; *Bronson* v. *Kinzie et al.*, 1 How. 311; *McGahey* v. *Virginia*, 135 U. S. 695."

A doctrine analogous to the one above discussed is inherent in the rule of construction that a statute should be construed prospectively rather than retroactively.

United States v. *St. Louis, San Francisco & T. R. Co.*, 270 U. S. 1:

"That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this court to statutes governing procedure, *United States Fidelity & G. Co.* v. *United States*, 209 U. S. 306 * * *."

See also:

Fullerton-Krueger Lumber Company v. *Northern Pac. Ry. Co.*, 266 U. S. 435;
Shwab v. *Doyle*, 258 U. S. 529;
Holt v. *Henley*, 232 U. S. 637.
Sohn v. *Waterson*, 17 Wall. 596;

The Court in *Bird* v. *United States*, 187 U. S. 118 said (Cited with approval in *U. S.* v. *Powers*, 307 U. S. 214):

"There is a presumption against a construction which would render a statute ineffective or inefficient,

or which would cause grave public injury or even inconvenience."

The assumption that the decision of the court to apply the amendatory Act should be *nunc pro tunc* as of a date earlier than January 10th, 1939, when the subject was first raised in the record, is likewise without support.

The prerequisite of a *nunc pro tunc* order is the entry of some earlier memorandum, order or decree by the court which is sought to be amplified or corrected.[7]

Since prior to January 10th, 1939, neither the District Court, nor the Circuit Court of Appeals, had made any memorandum or order with respect to the applicability of the amendatory Act, or, for that matter, had even considered the subject, there is no possible order or decree which might be seized upon as the basis of correction or amendment by a *nunc pro tunc* order. No error, omission or inadvertence of any court or clerk had occurred with respect to the subject and, accordingly, no grounds existed for the entry of a *nunc pro tunc* order.

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[7] *The Bayonne*, 159 U. S. 687;
Charles H. Wight v. *Joseph H. Nicholson*, 134 U. S. 136;
Hickman v. *Ft. Scott*, 141 U. S. 415;
Bank v. *Eldred*, 143 U. S. 293;
Rardin v. *Messick*, (C. C. A. 7 Cir. 1935) 78 F. (2d) 643;
Hammond Hotel & Imp. Co. v. *Chicago T. & T. Co.*, (C. C. A. 7 Cir. 1931) 55 F. (2d) 168;
The Princess Sophia (D. C., W. D., Wash. 1929) 36 Fed. (2d) 591.

III.

The Circuit Court of Appeals properly denied petitioner's motion to dismiss the appeal which it allowed to respondents.

For the purposes of the argument under this section, the correctness of both of petitioner's contentions will be assumed, *i.e.* (1) that this appeal is governed by the Chandler Act; and (2) that an appeal on fees involving more than $500 must be taken as of right rather than by leave of the Circuit Court of Appeals.

Even under these circumstances, the appeal was properly taken, since the motion of respondents for leave to appeal met all of the requirements for a notice of appeal and should be so treated. Section 24(b) of the Chandler Act (11 U.S.C.A. Sec. 47(b)) governs the method of taking an appeal as of right, and provides:

> "Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

General Order 36 (11 U.S.C.A., Sec. 53) in Bankruptcy provides:

> "Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in civil actions in the courts of the United States, including the Rules of Civil Procedure for the District Courts of the United States." (28 U.S.C.A. following section 723c.)

The Rules of Civil Procedure thus made applicable to an appeal in bankruptcy as of right provide (Rule 73):

> "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part

thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. * * *"

The procedure actually carried out by respondents met and fulfilled every purpose of the rule. The petition for leave to appeal specified that the respondents, as a Bondholders' Committee, were taking the appeal (R. 34); it designated the judgment appealed from (R. 34); it named the court to which the appeal was taken (R. 34); accompanying the petition for leave to appeal, an assignment of errors was provided (R. 40, 41); and full notification was given to and acknowledged by Petitioner herein (R. 41).

Of course, the petition and notice were not filed with the Clerk of the District Court but with the Clerk of the Circuit Court of Appeals. This distinction is particularly meaningless in this case, however, considering that the District Court itself directed that all of the original papers be assembled by the Clerk of the District Court and be transmitted by him to the Circuit Court of Appeals (R. 33, 34). The result, of course, is that all of the papers in the case, whether in the possession of the District Court Clerk or the Clerk of the Circuit Court of Appeals, shortly came into the possession of the latter, and are now held by him. The steps taken by respondents, therefore, fulfilled the purposes of the Rules of Civil Procedure, which would have governed had the appeal been taken as of right.

A liberal construction of the Rules of Civil Procedure is in accord with their spirit and intent. In the case of *Crump* v. *Hill* (C. C. A. 5 Cir.), 104 F. (2d) 36, Justice

Hutcheson determined that the requirement of a notice of appeal was met in including a waiver of service of notice, and the entry of an appearance, even though the actual notice of appeal was not filed. In the case at bar, the petitioner also entered its appearance (R. 43). Justice Hutcheson said:

> "We agree with appellant. It is true that Rule 73 does specifically provide that the only thing necessary to be done to perfect an appeal is to file notice thereof with the Clerk, making it the duty of the Clerk to see that notice thereof is served, and that a literal compliance with the Rule requires timely filing of the notice with the Clerk. The reason for the Rule, however, to set the appeal in motion by mere notice without judicial action, makes it quite clear we think that the appellant, when he procured from appellee and filed, her waiver of notice, her acceptance of designation, and her entry of appearance, just as effectively started his appeal as if he had merely filed the notice of appeal with, and left its service to, the Clerk. It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. But it would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights."

A similar liberal construction was adopted by the Circuit Court of Appeals for the Third Circuit, in *Ainsworth* v. *Gill Glass & Fixture Co.* (C. C. A. 3 Cir.), 104 F. (2d) 83.

In the case of *Martin* v. *Clarke* (C. C. A. 7 Cir.), 105 F. (2d) 685, the Court said:

> "Rule 73(b) of the Supreme Court, 28 U.S.C.A. following Section 723c, provides that 'The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken.' The object of the notice is merely to advise the opposite party that an appeal has been taken from a specific judgment in a particular case; if the notice is plain and explicit in this particular and sufficient in all other respects, it ought not to be declared ineffectual because of some slight mistake in the description of the judgment. Sections 472, 473, 3 Am. Jur. pp. 168 and 169. Courts are liberal in construing the sufficiency of a notice of appeal, and, where it appears from the notice, as in the instant case, that there is sufficient information acquainting appellee as to the judgment appealed from (the appellee not being prejudiced or misled) the mere fact that the designation of plaintiff and defendant was interchanged is no ground for dismissing the appeal. Accordingly, the motion to dismiss is overruled."

In *Siegel* v. *Margiotta* (C. C. A. 2 Cir.), 102 F. (2d) 525, the court held that the notice of a motion for leave to appeal filed in the Circuit Court of Appeals was the equivalent of a notice of appeal which was required to be filed in the District Court, saying:

> "The question is whether the appeal papers were served in season, assuming, as we do, that the notice of motion may be taken as the equivalent of a notice of appeal, since no leave was necessary."

Petitioner's sole reply to these cases is to the effect that "the *Crump* and *Martin* cases involve mere questions of form and not of substance." (See Petitioner's Brief, page 33.) The comment is not apt. Petitioner was not in any way injured by the fact that the notice of appeal was filed in the office of the Clerk of the Circuit Court of Appeals rather than in the office of the Clerk of the District Court. The place of filing the notice is no more or less a matter of form and substance than the filing of what the court considered to be an equivalent of the notice of appeal (as in the *Crump* case) or the filing of a notice of appeal which does not properly describe the judgment (as in the *Martin* case).

The sole comment which petitioner makes with respect to the *Siegel* case is that the Circuit Court of Appeals for the Second Circuit there "assumed without deciding that the motion for leave to appeal filed in the Circuit Court of Appeals might be taken as the equivalent of a notice of appeal."

The view of the court in *Siegel* v. *Margiotta, supra.*, is, however, sustained by ample authority. In *Taylor* v. *Voss*, 271 U. S. 176, this Court was presented with a case in many respects similar to the present one. There, as here, the appeal was instituted through the filing of a motion for leave to appeal in the Circuit Court of Appeals; there, as here, the complaint of the respondent was that the appeal should have been instituted in the District Court rather than in the Circuit Court of Appeals. The subject matter of the appeal involved a controversy between the trustee in bankruptcy and the testamentary trustee of the wife of the bankrupt, presenting an adverse claim which was properly appealable under Section 24a of the Act, which would have required the appeal to be taken as of right from the District Court. There, as here, respondent cited the de-

cision of this Court in *In Re Loving*, 224 U. S. 183, as authority for the proposition that the Circuit Court of Appeals should have dismissed the appeal. (See Footnote, Petitioner's Brief, page 32.)

This Court, in an exhaustive opinion in *Taylor* v. *Voss*, *supra*, held that the Circuit Court of Appeals properly denied the motion of the testamentary trustee to dismiss the appeal and properly heard the case on the petition to revise since only questions of law were presented. (Pertinent portions of the opinion are quoted in the Appendix to this brief.)

The analogy between *Taylor* v. *Voss*, *supra*, and this case is indeed striking. In the case at bar, as in *Taylor* v. *Voss*, the petition for leave to appeal raised only questions of law (R. 40); the Court of Appeals here, as there, in deciding the case, reached its decision on a matter of law —the range of judicial discretion—as distinguished from a fact question (R. 56). The view adopted in *Taylor* v. *Voss* has been expressed in other cases as well.

In Re Rasmussen, 287 Fed. 860 (certiorari denied *Graham; Chisholm & Co.* v. *Firth*, 262 U. S. 753)
Cohen v. *Schultz* (C. C. A. 3 Cir.), 43 F. (2d) 340.

The comment in *Taylor* v. *Voss* to the effect that the construction of the Act there made "gives it a practical effect removing in large measure the technical question of procedure which has so greatly obstructed its efficient administration, and served in so many instances as a trap, not intended by Congress, to unwary persons enmeshed in abstruse perplexities" has particular application to the case at bar. The order appealed from was entered on October 26, 1938, slightly over a month after the effective date of the amendatory Act of June 22, 1938. At that time

the new Rules of Civil Procedure had been promulgated by this Court and had become effective (28 U.S.C.A. following Sec. 723c). These rules superseded the General Equity Rules which had theretofore been in force. However, Rule 81a of the new Rules of Civil Procedure provided that—

> "They do not apply to proceedings in bankruptcy or proceedings in copyright under the Act of March 4, 1909, except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States."

It was not until January 16, 1939, that this Court promulgated the new Rules in Bankruptcy, and there provided, by Rule 36, that appeals in bankruptcy matters should be governed by the new Rules of Civil Procedure.

During the interim period, from September 16, 1938, when the new Rules of Civil Procedure became effective, until January 16, 1939, when this Court promulgated the new General Orders in Bankruptcy, any litigant seeking to take an appeal as of right in the District Court was in a dilemma. Section 24b of the amendatory Act of June 22, 1938 (11 U.S.C.A. Sec. 47b) provided that appellate jurisdiction should be exercised by appeal and in the form and manner of an appeal. The litigant was left with two choices as to how he could commence his appeal: (a) he could proceed under the former equity practice, and file a motion in the District Court for leave to appeal; but the difficulty with this procedure is that the new Rules of Civil Procedure superseded the former equity practice (48 Stat. 1064; 28 U.S.C.A. 723b); or (b) the litigant could proceed by filing a notice of appeal in the District Court as prescribed in the Rules of Civil Procedure; his difficulty then would be that the new Rules of Civil Procedure expressly stated that they were not applicable to bankruptcy proceedings

(Rules of Civil Procedure, Rule 81).[8] This difficulty actually occurred in connection with the notice of appeal served by petitioner in case 6842 on December 5, 1938 (R. 28). Motions to dismiss the appeal thus taken were filed by every appellee to that notice of appeal. Controversies over these motions and over the notices of appeal were, however, disposed of by settlement, except as to the allowance to Glenn Real & Browning, in which case an order affirming the District Court was entered (R. 41).

Wtih this background, the procedure adopted by these respondents becomes quite understandable. By filing a motion for leave to appeal in the Circuit Court of Appeals, they not only followed the express practice approved by this Court in *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172, but they adopted that procedure which was most favorable to petitioners here, since their appeal admittedly raised only questions of law and did not seek to litigate the facts. (See Petitioner's Brief, page 31.) Petitioner has suffered no hardship or inconvenience of any kind as a result of the procedure followed by these respondents in the taking and prosecuting of their appeal. As a matter of fact, it gained important rights in that respondents voluntarily foreclosed themselves from an argument over the facts.

Respondents in taking this appeal found themselves in a most peculiar and difficult position; no judge or court had made an order with respect to the applicability of the amendatory Act of June 22, 1938, to these proceedings (R. 49); grave doubt existed as to whether the new Rules of Civil Procedure or the former equity practice prescribed the proper procedure as to an appeal; the amendatory

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[8] *In Re Schwehm Realty Company*, 100 F. 2d 532 (C. C. A. 3 Cir.).

Act being but recently enacted and the Rules of Civil Procedure being but recently promulgated, no authoritative judicial construction of either the amendatory Act or of the Rules of Civil Procedure had occurred. To say, under these circumstances, as petitioner does, that respondents' appeal should be dismissed, seems indeed not only a harsh and inequitable result, but one contrary to the spirit of the new Rules of Civil Procedure and the General Orders in Bankruptcy.

IV.

The merits of the controversy between the petitioner and respondents have been adjudicated in favor of respondents.

Petitioner admits that the only question raised in the petition for certiorari and the record filed herein relates to the jurisdiction of the court of appeals to allow and entertain the appeal from the order involved in this case. (See Petitioner's Brief, pages 2, 9 and 39.)

It is not disputed, therefore, that the merits of this controversy are not now before this court for review, and that by petitioner's own choosing. Even in the Circuit Court of Appeals, petitioner's position was substantially the same:

> "It (the petitioner) does not seriously dispute the asserted insufficiency of the allowance, but argues that there was not such abuse of discretion as to warrant our disturbing this award." (R. 49.)

Therefore, the ruling of the Circuit Court of Appeals on the merits of this controversy is final and binding upon

all parties.[9] Petitioner's comments to the effect that it "does not admit the justice of the allowance made", (See Petitioner's Brief, page 39), are entirely beside the point. Petitioner has chosen to close these questions in this record.

CONCLUSION

For the reasons assigned, it is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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[9] *Prudence Company* v. *Fidelity & Deposit Co. of Maryland*, 297 U. S. 198, at 208;
Zellerbach Paper Co. v. *Helvering*, 293 U. S. 172, at 182;
Helvering v. *Taylor*, 293 U. S. 507, at 511;
Clark v. *Williard*, 294 U. S. 211, at 216;
Washington, Virginia & Maryland Coach Co. v. *National Labor Relations Board*, 301 U. S. 142;
Erie Railroad Co. v. *Collins*, 253 U. S. 77;
Great Northern Railway Co. v. *U. S.*, 208 U. S. 452.

APPENDIX

Taylor v. *Voss*, 271 U. S. 176 at page 184.

"This precise question, in the broad form in which it is now presented, has not been specifically decided by this Court. It is true that *In Re Loving, supra,* 188 (56 L. ed. 726, 32 Sup. Ct. Rep. 446), there was general language, incidentally used, which if taken broadly, indicates that 'controversies' which are appealable under Sec. 24a cannot be reviewed by petitions for revision under Sec. 24b. But, according to a familiar rule, this language should be regarded as limited by the circumstances in which it was used. *Cohen* v. *Virginia,* 6 Wheat. 264, 399, 5 L. ed. 257, 290; *Bailey* v. *Baker Ice Mach. Co.,* 239 U. S. 272, 60 L. ed. 285, 36 Sup. Ct. Rep. 50. The case did not present a 'controversy' appealable under Sec. 24a, but, as was explicitly stated, a 'proceeding' in bankruptcy relating to a proof of claim filed by a creditor, with the incidental assertion of a statutory lien, as to which a special appeal was granted by Sec. 25a, to be taken within ten days. The trustee contested both the amount of the claim and the existence of the lien. The bankruptcy court allowed the claim for its full amount as a lien against the bankrupt estate. Thereupon, more than ten days thereafter, the trustee filed a petition for a revision of this order, abandoning his contest as to the amount of the claim, and insisting merely that there was error in matter of law in allowing the lien as security. On a certificate from the circuit court of appeals, presenting the single question whether, under these circumstances, the order of the bankruptcy

court could be reviewed upon a petition for revision, it was held that Sec. 24b 'was not intended to give an additional remedy to those whose rights could be protected by an appeal under Sec. 25 of the Act.' And, since no question as to the effect of Sec. 24a was presented by the certificate or involved in the decision, it is clear that its effect must be limited, as a controlling authority, to the holding that when the ten days had expired within which the special appeal might have been taken under Sec. 25a, bringing up both the facts and the law, the trustee could not thereafter, by abandoning his contention of fact, obtain by a petition for revision a review of the question of law which he might have obtained by an appeal taken within the prescribed time, and thereby extend, as to the question of law, the time within which he was entitled to obtain a review of the order.

"On the other hand, in *Hewit* v. *Berlin Mach. Works*, *supra*, 299 (48 L. ed. 987, 24 Sup. Ct. Rep. 690), presenting a 'controversy' in a bankruptcy proceeding in which the facts were not disputed that had been reviewed by an appeal under Sec. 24a, it was distinctly recognized that a review might also have been had in matter of law by a petition for revision under Sec. 24b. And it is well settled by other decisions of this court that a 'controversy' in bankruptcy proceedings may be reviewed by a petition for revision as to some matters of law, at least. Thus, where a trustee has instituted a summary proceeding in a bankruptcy court for the recovery of property in the possession of a third person asserting a claim adverse to the bankrupt estate, a petition for revision will lie to bring up for review the question of law whether the court of bankruptcy has jurisdiction to adjudicate the

merits of such controversy in a summary proceeding. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 25, 46 L. ed. 413, 416, 22 Sup. Ct. Rep. 293; *Schweer* v. *Brown*, 195 U. S. 171, 172, 49 L. ed. 144, 145, 25 Sup. Ct. Rep. 15; *Galbraith* v. *Vallely*, 256 U. S. 46, 48, 65 L. ed. 823, 824, 41 Sup. Ct. Rep. 415; *Taubel-Scott Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 429, 68 L. ed. 770, 772, 44 Sup. Ct. Rep. 396. An analogous rule was also applied in *Weidhorn* v. *Levy*, 253 U. S. 268, 270, 64 L. ed. 898, 899, 40 Sup. Ct. Rep. 534. There the trustee had filed in the bankruptcy suit a bill in equity against an adverse claimant, thereby instituting a 'controversy' in the bankruptcy proceeding. The referee, over an objection to his jurisdiction had entertained the bill and entered a final decree in favor of the trustee. The district judge, considering the jurisdictional question alone, dismissed the bill upon the ground that the referee had exceeded his powers. This question was taken to the circuit court of appeals by a petition for revision, and while this court said that if the district court had sustained the jurisdiction and passed upon the merits, the decree could only have been reviewed by an appeal—evidently referring to a review both of fact and law—it was held that 'since the decision turned upon a mere question of law as to whether the referee had authority to hear and determine the controversy—in effect a question of procedure—it properly was reviewable by petition to revise under Sec. 24b.' And, subsequently, it was tacitly assumed by this court, in two decisions, without question, that where trustees had instituted summary proceedings in the bankruptcy courts involving controversies with third persons asserting adverse claims to the property of the bankrupts, the circuit courts of appeals had jurisdiction under petitions for revision

to determine all the questions of law presented on the undisputed facts, both as to the summary jurisdiction of the bankruptcy courts and the merits of the controversies; and this court based its judgments upon a review of the questions of law thus presented, both as to the existence of summary jurisdiction and the merits. *Board of Trade* v. *Johnson*, 264 U. S. 1, 6, 68 L. ed. 533, 534, 44 Sup. Ct. Rep. 232; *May* v. *Henderson*, 268 U. S. 111, 112, 69 L. ed. 870, 872, 45 Sup. Ct. Rep. 456.

"In the light of these decisions,—bearing in mind that the only distinction in matter of substance between an appeal and a petition for revision is that the one brings up for review questions both of fact and law, and the other, those of law merely, and finding nothing in the letter of the Act which necessarily makes the comprehensive remedy of an appeal as to both fact and law, exclusive of the narrower remedy of a petition for revision in matter of law,—we conclude that in a 'controversy' arising in a bankruptcy proceeding, it is not essential to a review, when the facts are undisputed or no longer questioned, that resort should be had to an appeal under Sec. 24a; but that in such case the controlling questions of law may also be reviewed by a petition for revision under Sec. 24b, whether they relate merely to the jurisdiction of the bankruptcy court or to the merits of the controversy. Such a review, however, by petition for revision, is a concurrent remedy merely, and in conformity with the decision in the *Loving* case, cannot, irrespective of any other limitation, be deemed an 'additional remedy' which may be resorted to after the time for an appeal has expired. This construction of the Act is, we think, consistent with its letter; accords with its spirit and manifest purpose; and gives

it a practical effect removing in large measure the technical question of procedure which has so greatly obstructed its efficient administration, and served in so many instances as a trap, not intended by Congress, to unwary persons enmeshed in abstruse perplexities.

"It results that, as the controversy in the present case was presented in the bankruptcy proceeding by consent of the parties, for determination as a matter of law on stipulated facts, it was properly reviewable by the circuit court of appeals in such matter of law under the petition for revision."